Supreme Court, U.S.
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No. 95-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GILBERT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. This Case Squarely Presents the Important Question Reserved by This Court in *NLRB v. General Motors*

In *NLRB v. General Motors Corp.*, 373 U.S. 734, 745 n.12 (1963), this Court expressly left open whether an employee denied full union membership for a reason other than nonpayment of dues can be discharged if he then does not pay dues: "the significance of desired, but unavailable, union membership, or the benefits of membership, in terms of permissible § 8(a)(3) security contracts, we leave for another case." Respondents' arguments that this case does not present that question are unavailing.

Respondent International Brotherhood of Boilermakers ("Boilermakers") attempts to distinguish this case by misstating the question reserved in *General Motors* as whether "an agency shop agreement ***that by its terms*** barred certain employees from full union membership would comport with § 8(a)(3)" of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. § 158(a)(3) (1988). Boilermakers' Opp'n at 11 (emphasis added). However, the question left open by the Court was not limited to the facial validity of agency shop agreements.[1] Section 8(a)(3)'s limits on the union requirements that may be imposed on employees as a condition of employment can be violated by either the terms of agreements ***or*** the practices of unions and employers in enforcing them. *See, e.g., Communications Workers Local 1104*, 520 F.2d 411, 417-20 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *Steelworkers Local 4186 (McGraw Edison)*, 181 N.L.R.B. 992, 992, 994-96 (1970).

Respondent National Labor Relations Board ("Board" or "NLRB") argues that this case does not present the question reserved in *General Motors*, because, it says, Petitioner James Gilbert ("Gilbert") "was not refused membership or the benefits of membership." NLRB's Opp'n at 11. In fact, the Boilermakers refused Gilbert the most important benefits of membership when

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[1] Significantly, the Boilermakers do not quote *General Motors*' statement of the reserved question. That would have given the game away.

it disciplined him: the rights to attend union meetings, vote on the election of officers and most other matters, and hold office. Pet. App. B at 39a-40a. This denial of membership rights was so serious that Gilbert effectively was refused membership. *McGraw Edison* treated a similar substantial disciplinary impairment of membership as a ***denial*** of membership. *See* 181 N.L.R.B. at 994 & n.6; *see also Communications Workers Local 9509*, 193 N.L.R.B. 83, 84 (1971) (case involving expulsion is "analogous" to one involving significant impairment of membership rights).

The Board contends that "the determination whether membership was 'available' to an employee on equal terms should be made as of the time the employee applies for membership in the union, and not . . . after the union has lawfully disciplined him for violating its rules." NLRB's Opp'n at 12 n.3. However, section 8(a)(3)'s second proviso contains no time limit on its prohibition of discharge for failure to pay dues where "membership was not available to the employee on the same terms and conditions generally applicable to other members," 29 U.S.C. § 158(a)(3), 2d proviso, pt. (A) (1988). Consequently, *McGraw Edison*, 181 N.L.R.B. at 992 (emphasis added), held that "a labor organization violates Section 8(b)(1)(A)[, 29 U.S.C. § 158(b)(1)(A) (1988),] by invoking, or threatening to invoke, a lawful union-security clause to enforce payment of dues by ***a member*** whose membership has been significantly impaired because he filed a decertification petition."

The legislative history of the Taft-Hartley Act amending the NLRA also shows that section 8(a)(3)'s second proviso applies to both applicants for membership and members. Senator Taft explained that the proviso was added in committee, because "the committee felt" that a union enforcing a union-shop agreement "must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, ***and must permit them to remain in the union*** if they are willing to pay their dues." Subcomm. on Labor, Sen. Comm. on Labor & Pub. Welfare, *Legislative History of the Labor Management Relations Act, 1947*, at 1096 (1974) (emphasis added). Senator Taft also gave an example of when the proviso would apply to members: "That provision . . . takes care of cases

similar to one in New York in which 10 men were fired because the union made a rule that it would not permit anyone to continue in membership unless he was the son of a man already working in that plant and a member of that union." *Id.* at 1420.

II. The Decisions Below Did Overrule, and This Case Is Not Distinguishable from, the *McGraw Edison* Line of Cases

Respondents argue that this case is different from, and did not overrule, the "line of six Board decisions beginning with *McGraw Edison*, and culminating with *Machinists District 94 (McDonnell Douglas)*, 283 N.L.R.B. 881 (1987)," Pet. App. A at 13a (citation omitted). Boilermakers' Opp'n at 13-14; NLRB's Opp'n at 13-14. However, Respondents totally ignore *Transportation Workers Local 525 (Johnson Controls World Servs.)*, 317 N.L.R.B. 402 (1995), Pet. App. F at 64a. In *Transportation Workers Local 525*, the Board ***itself*** explicitly held that its decision here "overruled sub silentio" the *McGraw Edison* line of cases. *Id.* at 402 n.2, 404-07, Pet. App. F at 64a n.2, 73a-82a.

Moreover, this case is not distinguishable from *McGraw Edison* and its progeny:

- The rule of those cases is that "a union may not invoke a union-security clause of a collective-bargaining agreement against an employee whose full union membership has been significantly impaired due to the exercise of Section 7 rights." *Transportation Workers Local 525*, 317 N.L.R.B. at 405, Pet. App. F at 77a. That rule applies where, as here, membership is substantially impaired, but not denied, and the discipline itself is lawful. That was the case in *McGraw Edison* and its most recent progeny, *Machinists District 94*.

The Boilermakers falsely state that in *McGraw Edison* a member's "suspension constituted an unfair labor practice." Boilermakers' Opp'n at 16. The Board does not identify the discipline in *McGraw Edison*, but misleadingly implies that it was unlawful; the Board also falsely states that the impairment of membership rights in *Machinists District 94* was held unlawful. NLRB's Opp'n at 13-14. In fact, in *McGraw Edison*, the employee was not suspended from membership at the relevant

time. Moreover, the Board there assumed that the reduction in his membership rights itself was lawful,[2] but held that the union's "**insistence upon [his] continued payment of dues** during periods when his rights as a member were significantly reduced **constituted a continuing form of [unlawful] coercion**." 181 N.L.R.B. at 992 (emphasis added). Similarly, in *Machinists District 94*, 283 N.L.R.B. at 892-93 & n.44, the Board presumed that an impairment of membership rights was lawful,[3] but held that the union violated section 8(b)(1)(A) by insisting on the payment of dues while that discipline was in effect.

- The Boilermakers argue that "the *McGraw Edison* line of cases is irrelevant here, since the activities for which Petitioner was sanctioned enjoyed no § 7 protection." Boilermakers' Opp'n at 17.[4] Gilbert and the three other employees named in his unfair labor practice charge were disciplined for proposing, at a union meeting and in a petition, that their local agree to remove certain positions from their bargaining unit. Pet. App. A at 5a-6a; Pet. App. B at 50a. As we show in the Petition at 19-21 and *infra* pages 9-10, this was dissident "free speech" activity protected by section 7 of the NLRA, 29 U.S.C. § 157 (1988).

- The Board emphasizes that in *McGraw Edison* the employee was disciplined "for petitioning the Board." NLRB's Opp'n at 14. However, the *McGraw Edison* rule also applies where, as here,

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[2] It was. *See Machinists Lodge 66*, 182 N.L.R.B. 849, 850 (1970).

[3] The only discipline held unlawful in *Machinists District 94* was fines. *See* 283 N.L.R.B. at 881 & n.4. This distinction between lawful impairment of membership rights and unlawful fines for postresignation conduct is consistent with later precedent. *See, e.g., Food & Commercial Workers Local 81*, 284 N.L.R.B. 1084, 1085-86 (1987).

[4] The Boilermakers' Opposition at 17 confuses the separate issues of what § 7 right protects the conduct for which Gilbert was disciplined and what right is restrained by the union's insistence upon payment of dues while the discipline is in effect. The former is the right to self-organization, *see* Pet. at 19-21; the latter is the right to refrain from membership except to the extent that § 8(a)(3) permits enforcement of a compulsory unionism agreement, *see id.* at 7.

employees are disciplined for exercising a section 7 right that does not involve the Board's processes: "a labor organization violates Section 8(b)(1)(A) . . . by invoking a lawful union-security clause to enforce payment of dues where employees have been denied union membership for exercising a right (crossing a picket line during a strike) guaranteed by Section 7 of the Act." *Communications Workers Local 1104*, 211 N.L.R.B. 114, 117 (1974), *enforced*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). This is true even if membership rights are substantially impaired, but not wholly denied. That was the case in *Machinists District 94*, 283 N.L.R.B. at 892. *See also Telephone Traffic Union*, 241 N.L.R.B. 826, 826 n.3 (1979) (quoting *Communications Workers Local 1104*, 211 N.L.R.B. at 116) (the *McGraw Edison* rule applies to "**all** situations 'where membership is denied **or impaired** because of employees' exercise of rights guaranteed them under Section 7 of the Act'") (emphasis added).

III. This Court's Decision in *Communications Workers v. Beck* Did Not Vitiate the *McGraw Edison* Rule

The Boilermakers contend that *Communications Workers v. Beck*, 487 U.S. 735 (1988), "renders the *McGraw Edison* line of cases little more than a legal dead-letter." Boilermakers' Opp'n at 20. The Board implies as much. *See* NLRB's Opp'n at 15-16. That is a wholly unwarranted misinterpretation of *Beck*.

The issue in *Beck* was whether the compulsory financial obligation sanctioned by section 8(a)(3) "includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. It was not whether employees who are denied membership or significant rights of membership have any financial obligation at all. "It is, of course, contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 n.5 (1992).

Therefore, *Beck*, 487 U.S. at 750, did not render the second proviso to section 8(a)(3) a nullity when it quoted the comment in *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976),

that "Congress' decision to allow union-security agreements at all reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." To the contrary, *Beck*, 487 U.S. at 744-45, cited the second proviso to section 8(a)(3) as one of the "limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements." Thus, *Beck* recognized that there are circumstances under which employees who receive the benefits of union representation cannot be required to pay for them.[5]

As *Beck*, 487 U.S. at 755 (quoting *Legislative History*, *supra* p. 2, at 470) (emphasis added), said, Congress intended the Taft-Hartley Act "to provide ***only the most grudging*** authorization of [union-security] agreements, permitting 'union-shop agreement[s] only under ***limited*** and administratively burdensome conditions.'" The legislative history of the second proviso to section 8(a)(3) supports the *McGraw Edison* rule. According to Senator Taft, that proviso was added in committee because "the committee felt that if it permitted a union shop agreement,"

> then the union . . . must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, ***and must permit them to remain in the union if they are willing to pay their dues***. In other words, the position of the committee was this: ***Either we must have an open shop or we must have an open union***.

Legislative History, supra p. 2, at 1096 (emphasis added).

Senator Taft emphasized several other times that under his bill there must be either an "open shop" or an "open union." *Id.* at 1010, 1097, 1420. If full membership is not available to all on the same terms, or is denied for reasons other than nonpayment of dues, then the union is not "open" as to the employees whose membership is impaired or denied. Thus, Senator Taft's state-

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[5] Another such circumstance is during the first 30 days of employment. *See* 29 U.S.C. § 8(a)(3), 1st proviso (1988).

ments imply the *McGraw Edison* rule: for those employees, section 8(a)(3)'s second proviso requires an "open shop."

The Boilermakers complain that this presents it with "a Hobson's choice" of either not disciplining disloyal members or permitting so-called "free riders." Boilermakers' Opp'n at 25. That choice seldom arises. Usually, as here, the union can lawfully impose a court-collectible fine. If that is the only penalty, it can still lawfully collect compulsory dues, because it has neither denied nor substantially impaired membership.

A union cannot lawfully fine, but can lawfully expel, suspend, or impair membership rights only if an employee is disciplined for activity: (1) related to a decertification or deauthorization petition or election, *Machinists Lodge 113*, 207 N.L.R.B. 795, 797-98 (1973); or, (2) occurring after the employee resigns, *Food & Commercial Workers Local 81*, 284 N.L.R.B. 1084, 1085-86 (1987). Only in those limited circumstances must the union choose between discipline and dues. However, this choice is consistent with the Act's underlying "policy of voluntary unionism," *Pattern Makers v. NLRB*, 473 U.S. 95, 114 (1985). As *Communications Workers Local 1104*, 520 F.2d at 420 (emphasis added), held in approving the *McGraw Edison* rule:

> while our decision necessarily entails some inroads on a union's ability to protect itself from free riders, the invasion is not serious. ***A contrary decision would create far greater problems of compulsory unionism, the elimination of which is as much a part of national labor policy as is the competing goal of protecting unions from free riders.***[6]

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[6] The *McGraw Edison* rule does not "effectively read out of the Act that portion of § 8(b)(1)(A) providing that a union shall not be impaired in prescribing and enforcing its internal membership rules," Boilermakers' Opp'n at 25. That proviso must be read together with the general rule to which it is an exception, and with §§ 7 and 8(a)(3). Sections 8(b)(1) and 8(a)(3), with other sections of the Act, "form a web, of which § 8(b)(1)(A) is only a strand." *Scofield v. NLRB*, 394 U.S. 423, 428-29 (1969).

IV. The Boilermakers' Argument Demonstrates the Split Among the Circuits About the *McGraw Edison* Rule

Respondents assert that the Court of Appeals' decision in this case does not conflict with the decisions of the Second and Sixth Circuits in *Communications Workers Local 1104* and *NLRB v. Pipefitters Local 120*, 719 F.2d 178 (6th Cir. 1983). Boilermakers' Opp'n at 22-27; NLRB's Opp'n at 16. However, the Boilermakers unwittingly show the conflict.

The Boilermakers argue that no conflict exists between the Court of Appeals' decision here and *Communications Workers Local 1104*, because, they say, the intervening decision in *Beck* mandated the decision here and established that *Communications Workers Local 1104* was wrongly decided. Boilermakers' Opp'n at 23-24. In other words, the decisions in this case and *Communications Workers Local 1104* **do** conflict!

Both Respondents contend that *Communications Workers Local 1104* and *Pipefitters Local 120* are distinguishable, because the employees' membership here was not wholly denied or ended, merely significantly impaired. NLRB's Opp'n at 16; Boilermakers' Opp'n at 26. The cases cannot be distinguished on this basis. When "membership is denied or terminated" for reasons other than nonpayment of dues, 29 U.S.C. § 158(a)(3), 2d proviso, pt. (B) (1988), and dues are still collected, the invidious practice is not denial of the title "member." It is deprivation of the rights to "attend union meetings, vote . . . , or participate in other internal union affairs." *See Pipefitters Local 120*, 719 F.2d at 184 (citing *Communications Workers Local 1104*). In short, the pernicious practice in the denial of membership is the substantial impairment of membership rights that occurred here.

The Boilermakers also argue that this case is distinguishable from *Communications Workers Local 1104*, because section 7 did not protect the employees' conduct here. Boilermakers' Opp'n at 24 n.14. As we show in the Petition at 19-21 and *infra* pages 9-10, that is wrong.

V. The Board's *Post Hoc* Argument that Section 7 Does Not Protect Employees' Efforts to Take Positions Out of a Bargaining Unit Is Unreasonable

The Boilermakers claim that the Board "recognized that Petitioner's conduct . . . was not protected under § 7." They argue that this decision "must be accorded deference and upheld if reasonable." Boilermakers' Opp'n at 27. However, in fact, the Board itself did not decide whether section 7 protects the conduct for which the union imposed discipline here. *See* Pet. App. B at 24a-26a. The Administrative Law Judge did rule that section 7 did not protect the employees' conduct, but without explanation. He simply assumed, *ipse dixit* and illogically, that, because the discipline did not violate the Act, the conduct was unprotected. *See id.* at 50a-53a. A holding that the Board's decision neither stated nor gave reasons for is due no deference.

Moreover, it is unreasonable to argue, as the Board now apparently does, and the Boilermakers explicitly do, that dissident intra-union activity is unprotected if it "violat[es] a legitimate union rule" that may lawfully be enforced with discipline. NLRB's Opp'n at 16; *see* Boilermakers' Opp'n at 27-28. A union may lawfully discipline its members for violating a rule against "strikebreaking," because "strikebreaking" undermines its effectiveness as a bargaining agent. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181-82 (1967). However, "strikebreaking" nonetheless is conduct protected by section 7. *Pattern Makers*, 473 U.S. at 101. Consequently, both the Second Circuit and the Board, at least before this case, held that a union violates section 8(b)(1)(A) if it insists on compliance with a compulsory unionism agreement by an employee whose membership it has denied or substantially impaired for "strikebreaking." *Communications Workers Local 1104*, 520 F.2d at 414, 418-19; *Machinists District 94*, 283 N.L.R.B. at 892-93.

Similarly, a union may lawfully discipline its members for violating a rule against not supporting it in organizing drives, because both defensive and offensive organizing "assist the union in solidifying" its status as collective-bargaining representative. *See Meatcutters Local 593*, 237 N.L.R.B. 1159, 1160-61 (1978).

Yet, section 7 still protects organizing for a rival union, and a union violates section 8(b)(1)(A), if it demands compliance with a "union security" agreement by an employee whom it has lawfully denied membership for such organizing. *Communications Workers Local 1104*, 520 F.2d at 414-15, 418-19.

There is simply no rational basis for distinguishing the dissident intra-union activity here from "strikebreaking," organizing for a rival, or the other dissident activities held to be protected by section 7 in the cases cited in the Petition at 19-21. Indeed, in another case not cited there, *Newspaper Guild Local 26*, 265 N.L.R.B. 382 (1982), the dissident activity held to be protected by section 7 was **the same** as that in this case: support of taking certain positions out of a bargaining unit.[7] *Compare id.* at 382-83 *with* Pet. App. A at 5a-6a. This also is not a "fact-bound" question, "limited to this case alone," as the Boilermakers' Opposition at 30 asserts. The issue presented is whether, **as a general principle**, employees' efforts to remove positions from their unit are protected by section 7.

CONCLUSION

The petition should be granted as to all questions.

Respectfully submitted,

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[7] The Boilermakers disingenuously suggest that Gilbert "could have resigned his membership and avoided any internal discipline whatsoever." Boilermakers' Opp'n at 28. If Gilbert had resigned, he could not have tried to get the members of his local to agree to take positions out of their unit, because nonmembers cannot make, debate, and vote on proposals at union meetings.